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AEDPA, Saucier, and the Stronger Case for Rights-First Constitutional Adjudication

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I. INTRODUCTION

More than a dozen times in the past five Terms, the Supreme Court has reversed an appellate court's decision granting post-conviction habeas relief to a state prisoner: not because it concluded that the state court had acted *correctly*, but because the state court's error was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the Supreme Court,[1] which is the standard of review prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[2] Moreover, the Court decided all of these cases without clarifying which legal rules actually applied to the habeas proceedings, leaving central questions of constitutional criminal procedure unanswered.

Emblematic of this trend is the January 2008 decision in *Wright v. Van Patten*,[3] in which the Court summarily reversed[4] a Seventh Circuit

† Associate Professor, American University Washington College of Law. This Essay arose out of a panel at the 2008 Annual Meeting of the Southeastern Association of Law Schools, for my participation in which I owe thanks to Andy Siegel. Thanks also to my co-panelists—Mike Allen, Amanda Frost, and Caprice Roberts—for their camaraderie and their comments, to Carolyn Robbs and the editorial staff of the *Seattle University Law Review* for their diligence and their patience, and to Nutan Patel for superlative research assistance.

1. *See* Wright v. Van Patten, 128 S. Ct. 743 (2008) (per curiam); Utrecht v. Brown, 551 U.S. 1 (2007); Schriro v. Landrigan, 550 U.S. 465 (2007); Carey v. Musladin, 549 U.S. 70 (2006); Rice v. Collins, 546 U.S. 333 (2006); Kane v. Garcia Espitia, 546 U.S. 9 (2005) (per curiam); Bradshaw v. Stumpf, 545 U.S. 175 (2005); Brown v. Payton, 544 U.S. 133 (2005); Bell v. Cone, 543 U.S. 447 (2005) (per curiam); Holland v. Jackson., 542 U.S. 649 (2004) (per curiam); Yarborough v. Alvarado, 541 U.S. 652 (2004); Middleton v. McNeil, 541 U.S. 433 (2004) (per curiam); Mitchell v. Esparza, 540 U.S. 12 (2003) (per curiam); Yarborough v. Gentry, 540 U.S. 1 (2003) (per curiam).

2. *See* 28 U.S.C. § 2254(d)(1) (1996).

3. 128 S. Ct. 743.

4. I use the term here to mean a disposition that occurs on the merits at the certiorari stage, without the benefit of additional briefing or oral argument. It is hardly exaggerating to suggest that a substantial percentage of the Court's summary dispositions over the past decade (especially its

decision granting habeas relief based on the petitioner's claim of ineffective assistance of counsel.[5] Specifically, Van Patten claimed that his Sixth Amendment rights had been violated because his lawyer participated in his plea colloquy by speakerphone. Applying the two-prong, circumstance-specific test for ineffectiveness enunciated by the Supreme Court in *Strickland v. Washington*,[6] the Wisconsin Court of Appeals rejected Van Patten's claim, concluding that there was no evidence that the physical absence of his counsel resulted in prejudice.[7] On post-conviction habeas corpus, the U.S. District Court for the Eastern District of Wisconsin agreed.[8]

The Seventh Circuit reversed,[9] concluding that the *Strickland* test was the incorrect standard to apply to Van Patten's claim, and that the Wisconsin Court of Appeals should have instead applied the categorical presumption of ineffectiveness articulated in *United States v. Cronic*.[10] Because the state court's error was not harmless, and because *Cronic* was unquestionably "clearly established" precedent, the Seventh Circuit concluded that habeas relief was warranted.[11]

On certiorari, the Supreme Court took no position on whether *Cronic* or *Strickland* was the appropriate test to apply in such circumstances. It merely noted that the answer to that question was unclear, and so it could not have been "contrary to or an unreasonable application of" clearly established federal law, as determined by the Supreme Court, for the Wisconsin state courts to apply the *Strickland* standard.[12] Van Patten

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summary reversals) have come in cases like *Van Patten*—where the Court of Appeals held that post-conviction habeas relief was warranted under AEDPA, and the Supreme Court reversed.

5. *See* Van Patten v. Endicott, 489 F.3d 827 (7th Cir. 2007) (per curiam), *rev'd*, 128 S. Ct. 743. The Court had previously vacated the Seventh Circuit's earlier decision in *Van Patten v. Deppish*, 434 F.3d 1038 (7th Cir. 2006), and remanded in light of its AEDPA-based decision in *Carey v. Musladin*, 549 U.S. 70 (2006). *See* Schmidt v. Van Patten, 549 U.S. 1163 (2007) (mem.). On remand, the same panel reaffirmed its earlier decision, albeit with one dissent. *See Van Patten*, 489 F.3d at 828–29 (Coffey, J., dissenting).

6. 466 U.S. 668 (1984).

7. *See* State v. Van Patten, 568 N.W.2d 653 (Wis. App.) (unpublished table decision), *review denied*, 576 N.W.2d 280 (Wis. 1997).

8. *See Van Patten*, 434 F.3d at 1041–42 (summarizing the background).

9. *See id*. at 1042–45.

10. 466 U.S. 648 (1984). *Cronic* was decided by the Supreme Court on the same day as *Strickland*, which may have contributed to the lower courts' confusion as to what constituted "clearly established federal law" as determined by the Supreme Court.

11. *Van Patten*, 434 F.3d at 1045–46; *see also Van Patten*, 489 F.3d 827 (reaffirming the earlier decision in light of *Musladin*).

12. *See* Wright v. Van Patten, 128 S. Ct. 743, 746 (2008) (per curiam) ("No decision of this Court . . . squarely addresses the issue in this case, or clearly establishes that *Cronic* should replace *Strickland* in this novel factual context. Our precedents do not clearly hold that counsel's participation by speaker phone should be treated as a 'complete denial of counsel,' on par with total absence.") (citation omitted).

lost, in other words, not because there was *no* precedent, but because it was unclear *which* precedent applied.

In a postscript to its brief opinion, the *Van Patten* Court agreed with Wisconsin's argument that the Seventh Circuit could have reached the same result in a direct federal appeal, but emphasized that "[o]ur own consideration of the merits of telephone practice . . . is for another day, and this case turns on the recognition that no clearly established law contrary to the state court's conclusion justifies collateral relief."[13] Put another way, even if the Court was convinced that the Seventh Circuit was correct—that *Cronic* is the appropriate test to apply in such cases—it refused to say so, resting its decision on its belief that the Wisconsin state courts did not act unreasonably.[14]

Van Patten is hardly alone in this regard. Every year brings with it a new wave of scholarship attacking the deferential review called for by AEDPA,[15] and new opinions by lower court judges expressing their frustration with the minimalist inquiry they are allowed to undertake in post-conviction habeas cases[16]—an inquiry centered on the reasonableness of trial court errors, as opposed to the actual impact of those errors on the fairness or accuracy of the underlying proceedings.[17]

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13. *Id*. at 747.

14. Indeed, Justice Stevens went so far as to suggest that the only reason why Van Patten was not entitled to habeas relief was because of a "drafting" error (that he, as the author of the majority opinion, made) in *Cronic*. *See id*. at 747–48 (Stevens, J., concurring in the judgment). As Stevens explained, "In light of *Cronic*'s references to the 'complete denial of counsel' and 'totally absent' counsel, and the opinion's failure to state more explicitly that the defendant is entitled to 'the presence of counsel [in open court],' I acquiesce in this Court's conclusion that the state-court decision was not an unreasonable application of clearly established federal law." *Id*. at 748. In other words, by simply omitting the words "in open court," *Cronic* failed to clarify what it meant—that the physical absence of counsel triggered a categorical presumption of ineffective assistance. *See also id*. ("The fact that in 1984, when *Cronic* was decided, neither the parties nor the Court contemplated representation by attorneys who were not present in the flesh explains the author's failure to add the words 'in open court' after the word 'present.'").

15. For a small sampling, see John H. Blume, *AEDPA: The "Hype" and the "Bite*,*"* 91 CORNELL L. REV. 259 (2006); James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998); Todd Pettys, *Federal Habeas Relief and the New Tolerance for "Reasonably Erroneous" Applications of Federal Law*, 63 OHIO ST. L.J. 731 (2002); and Joseph M. Brunner, Comment, *Negating Precedent and (Selectively) Suspending Stare Decisis: AEDPA and Problems for the Article III Hierarchy*, 75 U. CIN. L. REV. 307 (2006).

16. *See, e.g.*, Irons v. Carey, 505 F.3d 846 (9th Cir. 2007). Although the panel in *Irons* concluded that circuit precedent precluded them from reaching the question of AEDPA's constitutionality afresh, *see id*. at 854 n.5, two of the three judges penned concurrences bemoaning the extent to which AEDPA ties the hands of reviewing courts. *See id*. at 854–59 (Noonan, J., concurring); *id*. at 859 (Reinhardt, J., concurring specially).

17. *See id*. at 859 (Reinhardt, J., concurring specially) ("Congress tells us in AEDPA that we may not grant relief to citizens who are being held in prison in violation of their constitutional rights

An equally constraining aspect of AEDPA warrants criticism. In addition to affirming the deferential nature of review under AEDPA, the Supreme Court has concluded that only its holdings, not dicta, may provide the basis for relief under the statute.[18] In other words, the Justices themselves pretermitted the possibility that, even while denying relief in AEDPA cases, the Supreme Court might still enunciate forward-looking principles of constitutional law. Because the Court can only grant relief under AEDPA if the result was foreordained by its precedents, the federal courts in general, and the Supreme Court in particular, will never have the opportunity to make new law in cases in which AEDPA denies relief.[19] (That is, unless the reviewing court reached the error question first—a step that this article will argue is necessarily antecedent to the question of whether the law providing the basis for the state court's error was "clearly established" by the Supreme Court.)

The effect of these two shortcomings—the Court's decisions not to reach the issue of error where the lower court's action survives AEDPA's deferential standard of review, and the Court's decision that only holdings and not dicta can provide the basis for relief under AEDPA—is significant. Until the Court does reach questions like the one it avoided in *Van Patten*, criminal defendants across the country may be convicted using procedures suffering from the same identified (and litigated) constitutional defect. And, because of AEDPA and the Court's unwillingness to apply its holdings retroactivity, it will be all but impossible for those defendants to benefit from such a future Supreme Court decision unless their direct appeal is still pending when the later decision is handed down.[20] For example, defendants convicted in the time between when *Van Patten* is decided (call it T_0) and the hypothetical future case where the Court actually *does* reach the issue (call it T_1)

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unless the constitutional error that led to their unlawful conviction or sentence is one that could not have been made by a reasonable jurist.").

18. *See* Terry Williams v. Taylor, 529 U.S. 362 (2000). Because there were two different cases decided by the Supreme Court during its 1999 Term captioned "*Williams v. Taylor*," the convention is to use the petitioners' full names in identifying the cases. *See* RICHARD H. FALLON, JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1335–36 (5th ed. 2003).

19. That does not mean that relief is never warranted under AEDPA. On a host of occasions in recent Terms, the Court has granted (or upheld a lower court's grant of) relief in AEDPA cases because the underlying state court decisions were so inconsistent with Supreme Court precedent. *See, e.g.*, Panetti v. Quarterman, 551 U.S. 930 (2007); Brewer v. Quarterman, 550 U.S. 286 (2007); Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007); Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); Miller-El v. Cockrell, 537 U.S. 322 (2003). In each case, though, the majority opinion relied on prior decisional law—as AEDPA commands.

20. Under *Teague v. Lane*, 489 U.S. 288 (1989), a habeas petitioner may only invoke a "new rule" of criminal procedure—one formulated after his conviction—if the rule is a "watershed rule of criminal procedure," or one that goes to the constitutionality of the substance of his conviction. *See, e.g.*, Whorton v. Bockting, 549 U.S. 406, 416–17 (2007).

will be unable to prevail in their habeas petitions on an argument similar to that advanced by Van Patten—that *Cronic*, and not *Strickland*, governs their claim of ineffective assistance of counsel. So even if it was unnecessary to reach the constitutional question in Van Patten's case—because he would lose under AEDPA anyway—the Court's avoidance at T_0 may well preclude relief for defendants convicted between T_0 and T_1.

As the *Van Patten* Court itself suggested, the other obvious (and traditional) way around AEDPA would be for the Court to articulate the relevant substantive legal standard in the context of direct criminal appeals, in which AEDPA's deferential standard of review does not apply.[21] But as theoretically appealing as that option is, its practical likelihood runs squarely into the (shrinking) size of the Supreme Court's docket,[22] and the correspondingly small percentage of granted cases arising out of direct criminal appeals, especially criminal appeals from the state courts.[23] In short, even a more concerted effort on the Justices' part to hear direct criminal appeals from the state courts would at best mitigate, rather than obviate, the significance of the Court's ability to enunciate new principles of constitutional law in the context of post-conviction review.

In other contexts, the Court has shown far less reluctance to reach questions of constitutional law even if they may not be necessary to the case *sub judice*. Most familiarly, in the context of its qualified immunity jurisprudence, the Court for a time endorsed a rigid "order-of-battle" pursuant to which reviewing courts would decide whether the plaintiff had alleged a violation of a constitutional right before deciding whether that right was "clearly established,"[24] or whether the officer was entitled to immunity. That is, the courts were required to reach the "rights"

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21. There is also a small class of cases where AEDPA does not apply to state prisoners collaterally attacking their convictions in federal court—usually because the underlying constitutional claim was not presented to the state court, and yet it was also not defaulted, or any default was excusable. *See, e.g.*, House v. Bell, 547 U.S. 518, 539 (2006). That AEDPA does not constrain the federal courts' powers in those cases, though, does not change the effect that forward-looking pronouncements of constitutional law would have in AEDPA cases.

22. *See, e.g.*, Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363 (2006); Erwin Chemerinsky, *The Incredible Shrinking Docket*, TRIAL, Mar. 2007, at 64; *see also* Linda Greenhouse, *Dwindling Docket Mystifies Supreme Court*, N.Y. TIMES, Dec. 7, 2006, at A1.

23. For a particularly good treatment of this issue, see Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211 (2008).

24. There is some debate about whether Congress in AEDPA meant to codify "clearly established" law as it was then understood in the Court's qualified immunity jurisprudence. *Compare, e.g.*, Terry Williams v. Taylor, 529 U.S. 362, 380 n.12 (2000) (opinion of Stevens, J.), *with* O'Brien v. Dubois, 145 F.3d 16, 24–25 (1st Cir. 1998). For present purposes, whether the terms are congruent or merely analogus is irrelevant.

question as a necessary antecedent to whether the defendant could be held liable.[25]

Named the "*Saucier* sequence" for the 2001 decision that formalized it, this order of decision-making was the subject of substantial criticism from commentators, lower court judges, and even some of the Justices responsible for it.[26] These critiques culminated in the Court's January 2009 decision in *Pearson v. Callahan*,[27] in which the Justices unanimously overruled *Saucier*. As Justice Alito wrote for the Court,

> [W]hile the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.[28]

At the heart of the critiques that led to *Saucier*'s overruling in *Callahan* are a series of inter-related concerns: that *Saucier* required courts to unnecessarily decide questions of constitutional law; that such decisions were often "cert-proof" if the defendant prevailed on qualified immunity grounds anyway; that it forced courts to decide constitutional questions on underdeveloped factual records; and so on. Although the Court opined that courts generally should reach the rights question first in qualified immunity cases, the tide of scholarly opinion seems to support the Court's rejection of the mandatory methodological approach that *Saucier* commanded.[29]

This Essay suggests that many of the same reasons why *Saucier* proved so controversial—and perhaps even unworkable—in qualified immunity cases are less salient in the context of post-conviction habeas corpus, where the value of reaching potentially unnecessary questions of constitutional law far outweighs the cost. Put another way, my thesis is that, even though the *Saucier* sequence is no longer mandatory in qualified immunity jurisprudence, such a rigid methodological order of battle would be of great utility in the context of post-conviction habeas corpus—and in the adjudication of "new" rules of criminal law more

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25. *See* Saucier v. Katz, 533 U.S. 194 (2001), *overruled by* Pearson v. Callahan, 129 S. Ct. 808 (2009).

26. *See, e.g.*, *Callahan*, 129 S. Ct. at 817–18 (citing cases and articles).

27. 129 S. Ct. 808.

28. *Id*. at 818.

29. To be fair, as I note below, there are certainly scholars and jurists who support the *Saucier* approach. But as much as they are in the minority, my goal in this essay is not to ask whether they have the better argument, but to ask instead whether *Saucier*'s approach might have greater utility (and fewer shortcomings) in the context of post-conviction habeas cases under AEDPA.

generally. In that context, this Essay argues, the case for rights-first constitutional adjudication is far stronger.

To elaborate upon this argument, Part II begins with a brief descriptive overview of the Supreme Court's post-conviction habeas corpus jurisprudence, focusing on the particular significance of "new" rules of criminal law, and their applicability. Part III introduces the Court's qualified immunity case law, and explores both the origins of the *Saucier* sequence and the growing criticisms of the rights-first approach that led to its overruling this Term in *Callahan*. Finally, Part III turns to whether the *Saucier* sequence could be extrapolated into the context of post-conviction habeas corpus, considering both why it might work, and the counterarguments against it. Ultimately, as this Essay concludes, although AEDPA's deferential standard of review crystallizes the problem that federal courts face in post-conviction habeas cases today, the need for rights-first adjudication in that context actually predates the 1996 statute—and will survive any legislative attempt to repeal it.

II. "NEW" CONSTITUTIONAL LAW IN CRIMINAL CASES

Before turning to the particular complexities added by AEDPA, a brief survey is warranted of the Court's retroactivity jurisprudence with respect to post-conviction relief (through both direct appeals or habeas corpus), without which it would be difficult to understand the stakes when the Court declines to reach questions of constitutional significance in criminal cases.

A. Retroactivity and the Problem of New Rules[30]

As the conventional wisdom goes, the Supreme Court first began seriously grappling with the extent to which new constitutional rules should apply retroactively in criminal cases in the early 1960s.[31] The timing makes sense in several respects, since the Court had begun (1) endorsing a more robust view of the scope of federal habeas corpus review of state court convictions;[32] and (2) embracing a far broader view of the relevant constitutional protections that might apply to state-court proceedings in the first place.[33]

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30. Much of the discussion that follows is derived from the treatment of retroactivity in habeas corpus in FALLON ET AL., *supra* note 18, at 1325–35.

31. *See, e.g.*, Danforth v. Minnesota, 128 S. Ct. 1029, 1036–37 (2008).

32. *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963).

33. *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); Klopfer v. North Carolina, 386 U.S. 213 (1967); Pointer v. Texas, 380 U.S. 400 (1965); Aguilar v. Texas, 378 U.S. 108 (1964); Malloy v. Hogan, 378 U.S. 1 (1964); Ker v. California, 374 U.S. 23 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Robinson v. California, 370 U.S. 660

The issue of retroactivity for post-conviction relief was first confronted in the 1965 case of *Linkletter v. Walker*.[34] The *Linkletter* Court enunciated a three-part test, holding that the retroactive effect of a new rule of criminal law "should be determined on a case-by-case basis by examining the purpose of the rule, the reliance of the States on the prior law, and the effect on the administration of justice of retroactive application of the rule."[35] Although *Linkletter* was a habeas case, the Court later expanded its holding to encompass direct criminal appeals as well[36]—meaning that, under the Warren Court's jurisprudence, the same rule for retroactivity applied to a defendant whose direct appeal was still pending as to a defendant whose appeal had become final, but who subsequently invoked the same claim in a post-conviction habeas petition. So long as the relevant legal development post-dated the defendant's conviction, the standard was the same.

Justice Harlan (the younger) disagreed with this approach. He wrote separately in a series of cases to argue that the *Linkletter* test was unworkable and that the relevant standard should instead be a bright-line distinction between direct appeals and post-conviction claims.[37] Culminating with his dissent in *Desist v. United States*,[38] and his separate opinion in *Mackey v. United States*,[39] Justice Harlan argued that the Court's decisions should apply "retroactively" to all cases where the defendant's direct appeal was still pending, but should not generally apply retroactively via post-conviction habeas petitions. Emphasizing the significance of "finality," Justice Harlan suggested that the only exceptions in habeas cases should be where the petitioner attacked the constitutionality of the statute under which he was convicted,[40] or "for claims of nonobservance of those procedures that, as so aptly described by Justice Cardozo in *Palko v. Connecticut*, are 'implicit in the

(1962); Mapp v. Ohio, 367 U.S. 643 (1961). This list is hardly exhaustive, and a series of decisions incorporating other provisions of the Bill of Rights predated the Warren Court. But it should go without saying that the incorporation of much of the Fourth, Fifth, Sixth, and Eighth Amendments against the states dramatically expanded the scope of claims that could give rise to meritorious post-conviction federal habeas petitions.

34. 381 U.S. 618 (1965).

35. *Danforth*, 128 S. Ct. at 1036–37 (citing *Linkletter*, 381 U.S. at 629).

36. *See, e.g.*, Stovall v. Denno, 388 U.S. 293 (1967); Johnson v. New Jersey, 384 U.S. 719 (1966).

37. Justice Harlan concurred in *Linkletter* and its progeny: "I thought it important to limit the impact of constitutional decisions which seemed to me profoundly unsound in principle." Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting).

38. *See id*. at 258 ("[I] can no longer . . . remain content with the doctrinal confusion that has characterized our efforts to apply the basic *Linkletter* principle. 'Retroactivity' must be rethought.").

39. 401 U.S. 667, 675–702 (mem.) (Harlan, J., concurring in the judgment in part and dissenting in part).

40. *See id*. at 692–93.

concept of ordered liberty.'"[41] Otherwise, according to Justice Harlan, habeas courts should consider only whether the petitioner's trial was constitutional based on the law as it then existed.

The Supreme Court would ultimately embrace Justice Harlan's views in the late 1980s. The first facet of Justice Harlan's argument—that new rules should be retroactively enforceable in all cases where the direct appeal was still pending—was adopted by the Supreme Court in 1987 in *Griffith v. Kentucky*.[42] Two years later, and quite controversially,[43] a plurality of the Court adopted the second facet of Justice Harlan's approach—that new rules generally should not be retroactively enforceable via habeas corpus—in *Teague v. Lane*.[44] Although Justice O'Connor's defense of that approach largely reiterated Justice Harlan's rationale from *Desist* and *Mackey*, her analysis added two additional layers. First, she reasoned that in habeas cases the Court should reach the retroactivity of a new rule as a threshold matter, before deciding whether there should even be such a new rule. In her words:

> Retroactivity is properly treated as a threshold question, for, once a new constitutional rule of criminal procedure is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated. Thus, before deciding whether [there should be a new rule, we should ask] whether such a rule would be applied retroactively to the case at issue.[45]

Second, while recognizing that "[i]t is admittedly often difficult to determine when a case announces a new rule," Justice O'Connor adopted a definition of what constituted a new rule that was far broader than any reading the Court had previously employed:

> [A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated by precedent* existing at the time the defendant's conviction became final.[46]

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41. *Id*. at 693 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

42. 479 U.S. 314 (1987).

43. On the controversy surrounding *Teague*, see EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT 498–510 (2005).

44. 489 U.S. 288 (1989). A majority would soon endorse the plurality's approach. *See* Danforth v. Minnesota, 128 S. Ct. 1029, 1032 n.1 (2008) (citing Penry v. Lynaugh, 492 U.S. 302, 313 (1989)).

45. *Teague*, 489 U.S. at 300–01 (plurality opinion).

46. *Id*. at 301 (emphasis added and citations omitted).

As later cases would clarify, the "dictated by precedent" standard meant, as a practical matter, that even the most modest extensions of existing precedent would be new rules—and therefore not generally retroactively enforceable via habeas corpus—if *any* reasonable jurist might have found the extension unwarranted.[47] Thus, *Teague* simultaneously converted into new rules most decisions extending previously recognized rights into new contexts, and suggested that courts should not enunciate such new rules unless it would matter in the case *sub judice*.[48] Seven years before AEDPA, then, *Teague* raised substantial hurdles to the enunciation of new principles of constitutional law in criminal cases.[49]

B. AEDPA, "Clearly Established" Federal Law, and the Order of Battle

The story behind AEDPA's enactment in 1996 has been well-told elsewhere.[50] As relevant for purposes of this Essay, AEDPA rewrote 28 U.S.C. § 2254 to provide that

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .[51]

On its face, the biggest shift wrought by AEDPA was its requirement that the baseline of federal law be "clearly established Federal law, *as determined by the Supreme Court of the United States*." Arguably, *Teague* had already crafted something akin to the "clearly established" requirement in its sweeping reformulation of the idea of new rules, but *Teague* had pointedly not limited the relevant body of precedent to just the decisions of the Supreme Court. To the contrary, the lower courts continued to routinely apply circuit-level precedents in habeas cases in the period between *Teague* and AEDPA.

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47. *See, e.g.*, Caspari v. Bohlen, 510 U.S. 383 (1994); Butler v. McKellar, 494 U.S. 407 (1990).

48. Whether *Teague* mandated such an order of battle has divided the lower courts. *See* Campiti v. Matesanz, 333 F.3d 317, 321 & n.4 (1st Cir. 2003).

49. Needless to say, the Court was soundly criticized for doing so. Although the literature is voluminous, a particularly significant contribution is Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991).

50. *See, e.g.*, sources cited *supra* note 15.

51. 28 U.S.C. § 2254(d) (1996).

Furthermore, the new § 2254(d) raised a question of statutory interpretation that divided early courts: What does it actually mean for a state court decision to be "contrary to, or involv[ing] an unreasonable application of, clearly established Federal law"?[52] The Court took up this question in *Terry Williams v. Taylor*, decided in April 2000.[53]

1. *Terry Williams v. Taylor* and Dicta About Dicta

At issue in *Terry Williams* was whether the petitioner had received constitutionally ineffective assistance of counsel because his lawyers failed to investigate and present substantial mitigating evidence during the sentencing phase of his capital murder trial. Although six Justices agreed that Williams's *Strickland* claim was meritorious under AEDPA, the six divided over what kind of showing the new § 2254(d) required. Justice Stevens—writing in dissent on behalf of himself and Justices Souter, Ginsburg, and Breyer—interpreted § 2254(d)(1) as not altering the pre-AEDPA standard of independent, de novo review of federal constitutional questions. As Justice Stevens explained,

> [I]t is significant that the word "deference" does not appear in the text of the statute itself. Neither the legislative history nor the statutory text suggests any difference in the so-called "deference" depending on which of the two phrases ["contrary to" or "unreasonable application of"] is implicated. Whatever "deference" Congress had in mind with respect to both phrases, it surely is not a requirement that federal courts actually defer to a state-court application of the federal law that is, in the independent judgment of the federal court, in error.[54]

Writing for a majority as to the appropriate standard of review,[55] Justice O'Connor opined that AEDPA had to be understood as changing the law, especially in light of the congressional intent behind the statute. Suggesting that Justice Stevens's opinion "fails to give independent meaning to both the 'contrary to' and 'unreasonable application' clauses of the statute,"[56] Justice O'Connor concluded that "[i]f a federal habeas court can, under the 'contrary to' clause, issue the writ whenever it

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52. *See, e.g.*, Neelley v. Nagle, 138 F.3d 917 (11th Cir. 1998); Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996); Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997).

53. 529 U.S. 362 (2000).

54. *Id*. at 386–87 (Stevens, J.) (citations and footnote omitted); *see also Lindh*, 96 F.3d at 868.

55. Although Chief Justice Rehnquist and Justices Scalia and Thomas disagreed with Justices O'Connor and Kennedy that Williams was entitled to relief under AEDPA, they agreed with Justice O'Connor's articulation of the standard of review under AEDPA. *Terry Williams*, 529 U.S. at 416 (Rehnquist, C.J., concurring in part and dissenting in part).

56. *Id*. at 404 (O'Connor, J.).

concludes that the state court's application of clearly established federal law was incorrect, the 'unreasonable application' clause becomes a nullity."[57] Instead, Justice O'Connor concluded that the "contrary to" prong of § 2254(d)(1) contemplated relief only in those cases where the state court's decision was squarely in conflict with extant Supreme Court precedent. Otherwise, the question devolved to the "unreasonable application" prong, under which "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."[58]

Toward the end of her opinion, Justice O'Connor added a point that had not been addressed by Justice Stevens. Without any citation, Justice O'Connor observed that where § 2254(d)(1) refers to "clearly established Federal law, as determined by the Supreme Court of the United States," it "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision."[59] In other words, in what could only be described as dicta itself, Justice O'Connor stated that only the holdings of the Supreme Court could form the basis for habeas corpus relief under AEDPA, and nothing else. Expressions about what the law should be, even if unanimous, would mean nothing if they were completely unrelated to resolution of the merits of the appeal. Thus, if the reviewing court concluded that the state court's decision was not "unreasonable," nothing the same court said about the merits could subsequently form the basis for habeas relief under AEDPA.

2. *Andrade* and the Order of Battle

Notably, Justice O'Connor's opinion omitted any discussion about the decisional order of battle in AEDPA cases—whether courts could first reach whether the state court's decision was erroneous before assessing whether the error was reasonable. Such an omission was significant, given that reasonable jurists could certainly structure their decisions in a way where resolution of the error question was not dicta, but was instead necessarily antecedent to the question of entitlement to relief under AEDPA.

Less than a month after *Terry Williams* was decided, the Ninth Circuit answered the question of whether courts could first reach error in the affirmative, relying on the Court's (pre-*Saucier*) qualified immunity

57. *Id*. at 407.
58. *Id*. at 411.
59. *Id*. at 412.

jurisprudence for support. As Judge Reinhardt wrote for the panel in *Van Tran v. Lindsey*,

> Requiring federal courts to first determine whether the state court's decision was erroneous, prior to considering whether it was contrary to or involved an unreasonable application of controlling law under AEDPA, promotes clarity in our own constitutional jurisprudence and also provides guidance for state courts, which can look to our decisions for their persuasive value. Such a rule also respects our duty, as Article III judges, to say "what the law is." Accordingly, we hold that, when analyzing a claim that there has been an unreasonable application of federal law, we must first consider whether the state court erred; only after we have made that determination may we then consider whether any error involved an unreasonable application of controlling law within the meaning of § 2254(d).[60]

The Ninth Circuit was the only circuit court to *mandate* such a two-step analysis after *Terry Williams*.[61] Two other circuits, the Fourth and the Fifth Circuits, squarely rejected that approach,[62] whereas the First and Second Circuits held that it was permissible, but not mandatory, to reach the question of error first.[63] In *Lockyer v. Andrade*, the Supreme Court sided with the First and Second Circuits, holding that "AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under § 2254(d)(1)—whether a state court decision is contrary to, or involved an unreasonable application of, clearly established federal law."[64]

Thus, due to *Andrade*, the federal courts are allowed, but not required, to reach whether the state court committed error before deciding whether that error was unreasonable. Nevertheless, in the six years since *Andrade* was decided, the vast majority of AEDPA cases have seen adjudication similar to that undertaken by the Supreme Court in *Van Patten*; in cases where it was not strictly necessary to reach whether the state court committed error—cases where any error was not

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60. Van Tran v. Lindsey, 212 F.3d 1143, 1155 (9th Cir. 2000) (citations omitted); *see also id*. at 1155 n.17 ("The method we adopt does not require that we render advisory opinions. As the Court's reasoning in *County of Sacramento* makes clear, we cannot make a determination that a decision is contrary to or involves an unreasonable application of clearly established federal law without implicitly commenting upon what the state of the law is. Given that we must necessarily resolve questions of federal law whenever we address a habeas petition under AEDPA, it behooves us to do so clearly and explicitly.") (citations omitted).

61. *See* Clark v. Murphy, 317 F.3d 1038, 1044 n.3 (9th Cir. 2003).

62. *See* Valdez v. Cockrell, 274 F.3d 941, 954 n.19 (5th Cir. 2001); Bell v. Jarvis, 236 F.3d 149, 160 (4th Cir. 2000) (en banc).

63. *See* Kruelski v. Conn. Super. Ct. for the Judicial District of Dansbury, 316 F.3d 103 (2d Cir. 2003); Hurtado v. Tucker, 245 F.3d 7, 16 (1st Cir. 2001).

64. 538 U.S. 63, 71 (2003).

unreasonable—courts have generally rested their decisions solely on the reasonableness prong of § 2254(d)(1). With no compulsion to reach the error question first, there has simply been no incentive for courts to expend precious resources in cases where such analysis does not make a difference. Instead, as in *Van Patten*, criminal defendants are left to their direct appeals, and their direct appeals only, to pursue claims based on new law.

III. QUALIFIED IMMUNITY AND THE *SAUCIER* SEQUENCE

Although civil suits against government officers for damages—where qualified immunity defenses typically arise—are quite distinct from habeas cases, there are significant similarities between resolution of qualified immunity and AEDPA relief. Like post-conviction habeas cases under AEDPA, a defense of qualified immunity to a damages action against a government officer generally turns on two questions: whether the officer's alleged conduct violated a right held by the plaintiff, and whether that right was clearly established such that a reasonable officer should have known that his conduct was unlawful.[65] And, as in AEDPA cases, the officer will prevail if the answer to either question is no. Thus, qualified immunity cases, in the abstract, raise similar issues concerning the ordering of judicial decision making and the possibility that the relevant substantive law will be "frozen" by judicial reliance on the non-rights prong in denying relief in the vast majority of cases.

For a time, the Supreme Court's approach in qualified immunity cases resembled the approach that it appeared to endorse in AEDPA cases in *Andrade*—favoring resolution of the rights question first, but not requiring as much. As Justice Souter explained in *County of Sacramento v. Lewis*,

> the *better* approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question.[66]

This ordering was preferable, Justice Souter explained, because "if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of

65. The contemporary standard for qualified immunity has its origins in the Supreme Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

66. 523 U.S. 833, 841 n.5 (1998) (emphasis added).

primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals."[67]

Three years later, at the end of its 2000 Term, the Court mandated such a methodology in *Saucier v. Katz*.[68]

A. Saucier

Although the question presented in *Saucier* turned on the particular complexities of assessing qualified immunity defenses in excessive force cases, Justice Kennedy began his opinion for the Court by emphasizing that the purpose of a qualified immunity defense—to resolve the officer's immunity at the earliest possible stage of the litigation—requires reviewing courts to first ensure that the plaintiff has alleged the violation of a constitutional right before reaching whether that right was clearly established, and whether the officer is therefore liable. As he explained,

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.
>
> If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.[69]

Thus, to Justice Kennedy, rights-first adjudication served the dual purposes of allowing for "the law's elaboration from case to case," and potentially allowing for the resolution of suits challenging official action at an earlier stage, to spare the officer from the cost of further litigation.

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67. *Id*. (also noting that "[i]n practical terms, escape from uncertainty would require the issue to arise in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion in a criminal proceeding; in none of these instances would qualified immunity be available to block a determination of law").

68. 533 U.S. 194 (2001).

69. *Id*. at 201 (citation omitted).

Curiously, though, Justice Kennedy offered no explanation in his opinion for why it was necessary to mandate such an approach, as opposed to the approach adopted by the Court in earlier cases—of preferring such a methodology as the better approach in most cases. Certainly, in cases where the scope of a constitutional right was unclear, it would be far less taxing for the court—and the litigants—to simply grant qualified immunity on the ground that the law was not clearly established than to first clarify the law.

Such an omission is all the more inexplicable given that, in her concurrence in the judgment, Justice Ginsburg suggested that excessive force cases were one of the few sets of cases where such a two-step analysis did *not* make sense:

> [P]aradigmatically, the determination of police misconduct in excessive force cases and the availability of qualified immunity both hinge on the same question: Taking into account the particular circumstances confronting the defendant officer, could a reasonable officer, identically situated, have believed the force employed was lawful? Nothing more and nothing else need be answered in this case.[70]

Yet, although Justices Stevens and Breyer joined in Justice Ginsburg's concurrence, none of them objected to adoption of the two-step sequence in other contexts, or to the notion that rights-first adjudication would *usually* serve the beneficial purpose of developing constitutional doctrine, even in cases where the officers ultimately were entitled to immunity. The fault line, instead, turned simply on whether the *Saucier* sequence was to apply in all cases.

B. The (Growing) Criticisms of the Saucier *Sequence*

Very quickly, however, the inflexibility of the so-called "*Saucier* sequence" became a lightning rod for lower court judges, commentators, and even the Justices themselves. Perhaps foremost among the critics has been Justice Breyer, beginning in *Brosseau v. Hagan*,[71] and culminating with his concurrence in *Scott v. Harris*:

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70. *Id*. at 210 (Ginsburg, J., concurring in the judgment) (citations omitted).

71. *See* 543 U.S. 194, 201–02 (2004) (Breyer, J., concurring) ("[T]he current rule rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (e.g., qualified immunity) that will satisfactorily resolve the case before the court. Indeed when courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense and can sometimes lead to a constitutional decision that is effectively insulated from review. For these reasons, I think we should reconsider this issue.") (citation omitted).

> Sometimes (*e.g.*, where a defendant is clearly entitled to qualified immunity) *Saucier*'s fixed order-of-battle rule wastes judicial resources in that it may require courts to answer a difficult constitutional question unnecessarily. Sometimes (*e.g.*, where the defendant loses the constitutional question but wins on qualified immunity) that order-of-battle rule may immunize an incorrect constitutional ruling from review. Sometimes, as here, the order-of-battle rule will spawn constitutional rulings in areas of law so fact dependent that the result will be confusion rather than clarity. And frequently the order-of-battle rule violates that older, wiser judicial counsel "not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." In a sharp departure from this counsel, *Saucier* requires courts to embrace unnecessary constitutional questions not to avoid them.[72]

Justices Stevens and Scalia have joined in Justice Breyer's critiques,[73] and most lower court judges have been equally unabashed in their evaluations, both on[74] and off[75] the bench. Moreover, in addition to the particular concerns raised by Justice Breyer, lower court judges have noted the difficulty of resolving constitutional questions on an underdeveloped (if not completely *un*developed) factual record, given that defendants are often allowed to take an interlocutory appeal from pre-trial denials of qualified immunity.[76]

Finally, in academic circles, a host of commentators have decried *Saucier* as the most egregious in a growing body of federal court decisions opening the door to unnecessary judicial decisions on constitutional questions—a pattern that raises serious policy concerns, and that

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72. 127 S. Ct. 1769, 1780 (2007) (Breyer, J., concurring) (citations omitted); *see also* Morse v. Frederick, 127 S. Ct. 2618, 2641 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (making a similar argument).

73. *See, e.g.*, Los Angeles County v. Rettele, 127 S. Ct. 1989, 1994 (2007) (Stevens, J., concurring in the judgment); Bunting v. Mellen, 541 U.S. 1019, 1019–20 (2004) (Stevens, J., respecting the denial of certiorari); *id*. at 1022–26 (Scalia, J., dissenting from the denial of certiorari).

74. *See, e.g.*, Callahan v. Millard County, 494 F.3d 891 (10th Cir. 2007), *rev'd sub nom*. Pearson v. Callahan, 129 S. Ct. 808 (2009); McClish v. Nugent, 483 F.3d 1231 (11th Cir. 2007); Ehrlich v. Town of Glastonbury, 348 F.3d 48 (2d Cir. 2003); Dirrane v. Brookline Police Dep't, 315 F.3d 65 (1st Cir. 2002). For a particularly thorough—and widely cited—discussion, see *Lyons v. City of Xenia*, 417 F.3d 565, 582–85 (6th Cir. 2005) (Sutton, J., concurring).

75. *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275 (2006).

76. On the appealability of denials of qualified immunity, see *Behrens v. Pelletier*, 516 U.S. 299 (1996), and *Johnson v. Jones*, 515 U.S. 304 (1995). For the difficulties appellate courts face deciding such claims on skimpy records, see *Lyons*, 417 F.3d at 582 (Sutton, J., concurring), and *Wong v. U.S. I.N.S.*, 373 F.3d 952, 957 (9th Cir. 2004).

perhaps may even implicate constitutional values.[77] Although the criticism of *Saucier* has hardly been unanimous,[78] the momentum in favor of abandoning the *Saucier* sequence led to the Supreme Court's decision in *Pearson v. Callahan*, where it unanimously decided that *Saucier* should be overruled. Justice Alito's opinion for the Court was unhesitating in its criticism of the mandatory approach to resolving qualified immunity cases.[79] Nonetheless, the Court was careful to suggest that it was still preferable, in the run of cases, for courts to reach the rights question first. As Justice Alito explained, "Our decision does not prevent the lower courts from following the *Saucier* procedure; it simply recognizes that those courts should have the discretion to decide whether that procedure is worthwhile in particular cases."[80]

Although I have my own views on the Court's decision in *Callahan*, the point of this Essay is to consider whether something akin to *Saucier*'s methodology might make more sense in AEDPA cases, regardless of *Callahan*'s abrogation of such an approach in qualified immunity cases. To that end, my remaining focus is on whether the various critiques of *Saucier* have lesser force in the context of post-conviction habeas.

C. Exporting the Saucier *Sequence to AEDPA Cases*

To briefly recap from above, we might summarize Justice Breyer's objections to *Saucier* as encompassing three distinct concerns, and the objections by lower court judges as adding a fourth: (1) that *Saucier* required courts to reach constitutional questions that were otherwise unnecessary to resolve the case before them; (2) that *Saucier* led to "cert-proof" judgments because defendants had little-to-no incentive to appeal adverse constitutional rulings when they prevailed on immunity grounds anyway; (3) that *Saucier* spawned incredibly fact-specific constitutional holdings in areas where idiosyncrasies of individual cases reduce the value of precedent; and (4) that *Saucier* required reviewing courts to decide constitutional questions on sparse factual records.

The "sparse-record" critique is readily disposed of in the context of post-conviction habeas cases under AEDPA, since the statute requires

77. *See, e.g.*, Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847 (2005).

78. *See, e.g.*, John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403 (1999); Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of* Saucier v. Katz, 16 GEO. MASON L. REV. 53 (2008); Michael L. Wells, *The "Order-of-Battle" in Constitutional Litigation*, 60 SMU L. REV. 1539 (2007).

79. *See* 129 S. Ct. 808, 815–18 (2009) (summarizing the criticism of *Saucier*).

80. *Id*. at 821.

that the federal constitutional claim be fully and fairly presented to the state courts. As a result, the problem of an underdeveloped record should be nonexistent in post-conviction cases.

Justice Breyer's concerns, on the other hand, require a bit more consideration. With regard to his second concern with the problem of cert-proof judgments, one response may be that in AEDPA cases, it is only Supreme Court precedent that can form the basis for relief. As such, it will usually be the Supreme Court itself that pronounces such forward-looking principles, decisions that are, by definition, not cert-proof. As for the lower courts, they are only allowed to look to (and apply) extant Supreme Court case law as a basis for relief. Although it is certainly possible that the lower courts will commit error simply in applying previous and well-established Supreme Court precedents, such a possibility is far more remote than in the qualified immunity context, where appellate courts are free to apply their own precedents as well. Accordingly, the concern with cert-proof objections is legitimately diluted in the context of AEDPA cases.

Justice Breyer's third concern—that *Saucier* requires the formulation of constitutional law in cases with highly specific fact patterns, leading to idiosyncratic constitutional rules—is certainly also an issue in AEDPA cases. Even focusing only on Sixth Amendment ineffective assistance of counsel claims, claims of specific misconduct by attorneys may well lead to highly fact-specific applications of the *Strickland* rule, as typified in the Court's recent decisions in *Wiggins v. Smith*[81] and *Rompilla v. Beard*.[82] But it is probably uncontroversial to note that the range of idiosyncratic—and yet constitutionally material—facts in post-conviction cases is far narrower than the comparable range in damages cases. Put simply, there are far fewer rights for state courts to violate in a criminal trial than there are for a state officer to violate in everyday contact with citizens at large. Again, my point is not that these concerns disappear altogether in the context of AEDPA cases; rather, it is that these concerns have at least somewhat less suasion.

Another larger point bears emphasizing, especially as it relates to Justice Breyer's first—and the most widely-shared—critique of *Saucier*, i.e., that a rigid order-of-battle requires courts to unnecessarily reach constitutional questions. There is no doubt that, on the surface, this concern is at least as present in AEDPA cases as in qualified immunity cases where the law is not clearly established and relief is thus foreclosed. However, there is an obvious and vital distinction between

81. 539 U.S. 510 (2003).
82. 545 U.S. 374 (2005).

the two bodies of law. In qualified immunity cases, a failure to enunciate a principle of constitutional law at T_0 does not mean that an officer who commits similar conduct at T_1 has acted *lawfully*; rather, it means only that the plaintiff is not entitled to damages for the officer's transgression. The plaintiff may still pursue other non-monetary remedies against the officer, and the officer may well face disciplinary action for his offense.[83]

In AEDPA cases, in contrast, a failure to enunciate a particular principle at T_0 will usually bar any form of relief or remedy altogether, and so a defendant who might otherwise have been entitled to a new trial—if not to outright release—remains incarcerated. Put another way, there is at least a colorable argument that the failure to enunciate forward-looking principles in qualified immunity cases does not forever enshrine what the relevant officer did, whereas a similar failure in AEDPA cases *does* insulate the state court from any repercussions for its failure to reach the "correct" result. Thus, what is unnecessary in the context of civil-rights damages actions may be absolutely necessary in the context of other criminal defendants facing incarceration or even execution, and the canonical reliance on the doctrine of constitutional avoidance may be quite myopic.

Thus, the most common critiques of the *Saucier* sequence have less force when applied to post-conviction habeas cases under AEDPA. Moreover, as discussed previously, there are compelling reasons to import the rigid order-of-battle prescribed by *Saucier* into the context of post-conviction habeas cases under AEDPA, and even those that fall outside of AEDPA but nevertheless implicate *Teague*'s retroactivity analysis. So long as the relevant court has the power to reach the merits of the petitioner's habeas claim, I believe it has an obligation—not just to that petitioner, but to similarly situated criminal defendants whose claims have not yet ripened—to identify constitutional errors even when those errors cannot form the basis for relief.

D. Counterarguments

That is not to say that there are not compelling counterarguments to my thesis—and from both directions, at that. For starters, it is inconsistent with the Supreme Court's own precedent because the Court specifically disavowed such an approach in *Andrade*, which abrogated the Ninth Circuit's earlier decision in *Van Tran*. Under *Andrade*, habeas courts are free to reach the state court's error first; they are just not required to do so. Thus, for my thesis to work, it would require the Court

83. *See, e.g.*, *Callahan*, 129 S. Ct. at 822; *see also* County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998).

itself to change course and reconsider its brief discussion of this point in *Andrade*.[84]

Second, and relatedly, is the question of why the *Andrade* standard is insufficient. If courts are free to reach error in AEDPA cases before reaching the reasonableness of the error, why compel—rather than encourage—them to do so? This was the *Callahan* Court's central argument against *Saucier*, and I suspect it is also the strongest counterweight to the proposal I have advanced herein. The short answer is anecdotal: since *Andrade* was decided, the vast majority of courts just haven't reached the error question first in cases where it has not mattered. Some judges do, to be sure, but the decision whether or not to formulate forward-looking principles of constitutional law hardly seems like the kind of responsibility that we should leave to the discretion of the judge, or to the vagaries of which judges end up deciding which cases.

Third, a rigid order-of-battle in AEDPA cases would unquestionably increase the workload on already-overworked district judges, who are already overburdened, and who might not take kindly to the burden of resolving questions unrelated to the disposition of the case before them. As noted by Justice Alito in *Callahan*, a strict order-of-battle "sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case. . . . District courts and courts of appeals with heavy caseloads are often understandably unenthusiastic about what may seem to be an essentially academic exercise."[85] On the other hand, there might be a far more compelling reason to impose such a burden in habeas cases than in damages lawsuits, given that the court's opinion may well prove dispositive in a host of cases not then pending.

IV. CONCLUSION

In a way, this is a strange Essay, for it is meant to mitigate the impact of a statute that the Supreme Court has repeatedly endorsed by adopting an approach that it has specifically rejected. It should go without saying that part of the motivation is my own distaste for the deferential review mandated by AEDPA in an area where the Court had already done quite a lot to tip the scales in the state courts' favor.

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84. Of course, Congress could amend AEDPA to require such an approach, but I assume for purposes of this Essay that AEDPA remains on the books as is. If the 111th Congress chooses to revisit AEDPA, I suspect that the order-of-battle would be the least of its concerns—and that the AEDPA-centric argument I make in this Essay would quickly become moot.

85. *Callahan*, 129 S. Ct. at 818.

That being said, my goal is rather modest. I do not mean to suggest a wholesale reconceptualization of the purpose(s) of post-conviction habeas corpus, or to identify a magic bullet to solve the difficult questions arising from the formulation of new rules in criminal cases and their retroactive application, or even to suggest that the rule for which I am arguing has any constitutional underpinnings. Rather, the purpose of this Essay is merely to suggest that, owing to a combination of the language of AEDPA and to the Court's own development of its habeas corpus jurisprudence, the substantive merits of habeas cases matter even when they are not dispositive, and the Supreme Court's avoidance of resolving constitutional questions comes at the specific and concrete expense of future criminal defendants whose liberty turns not on what the law actually is, but on when it is finally pronounced. This is a trap that the Supreme Court has set for itself, and one that it can maneuver out of with little in the way of doctrinal displacement. My proposal—that the Supreme Court should export the now-rejected *Saucier* sequence into the context of AEDPA cases—is hardly a perfect solution, or one that would come without substantial costs to lawyers and judges alike. But if cases like *Van Patten* are any indication, such a model of rights-first constitutional adjudication is immensely preferable to the status quo.